

## PATIENTS' BILL OF RIGHTS

Mr. DASCHLE. Mr. President, I will take just a few moments to share with my colleagues where we are with regard to our negotiations, and then talk a little bit about the bill itself, the Patients' Bill of Rights.

Senator LOTT and I have had a number of discussions this morning. We are trying to find a way to proceed. I think it is fair to say that we are continuing to lose precious time in an effort to try to resolve our procedural differences. I am hopeful we might be able to reach some agreement. I am not wedded to the latest proposal I have shared with the majority leader, but we do need a time certain for consideration of this bill in the very near future. We certainly need to have the assurance that the amendments we will offer will be considered and voted upon by the Senate.

Those are our two principles: No. 1, a time certain for consideration of this bill; No. 2, some assurance that we will have the opportunity to debate amendments and have votes.

We recognize that with 45 Democrats we may not have the necessary votes to win a contest with our Republican friends on a comprehensive bill. However, we do know there are a good number of Senators who have expressed their support for various issues in our bill. We hope we can work through those issues and have the assurance we can have a good debate and good votes.

We cannot agree to any time certain for final passage if we cannot agree that we will have at least an opportunity to debate these amendments and have votes.

Again, our two principles: A date certain, and an opportunity to have up-or-down votes, or even tabling votes, on the amendments we want to offer.

I am hopeful we can work through those two principles and find a way that is mutually acceptable. The majority leader, as always, is attempting to be as responsive as he can. I appreciate the cooperative spirit with which we have been undertaking these discussions over the last 24 hours.

One of the reasons we feel so strongly about amendments is that they cause the Senate to focus on what it is we are talking about when we say the words "Patients' Bill of Rights." I don't know that a lot of people fully understand the magnitude of those words. What does "Patients' Bill of Rights" actually mean? We want to be able to spell out what it means.

I want to give one example, because it will be an amendment if we can't get an agreement. Our first amendment will deal with medical necessity. Medical necessity simply suggests that medical decisions ought to be made by medical professionals, not bureaucrats. Our amendment would prevent arbitrary interference by insurers regarding treatment decisions such as hos-

pital length of stay. It also would establish a fair definition of medical necessity. Medical necessity, in our judgment, should simply be an opportunity to use good, professional, medical judgment about the course of action involving a patient. That is what we mean by medical necessity.

I will read for our colleagues two other definitions of medical necessity that are currently in insurance policies for HMOs. I must add, I am not making this up. The first is from a Missouri insurance contract. I will read the definition of medical necessity taken right from the insurer's policy.

The company will have the sole discretion to determine whether care is medically necessary. The fact that care has been recommended, provided, prescribed or approved by a physician or other provider will not establish that care is medically necessary.

Let me just make sure everybody understands what this says. It says we do not care whether a doctor or a nurse or any kind of provider has recommended, provided, prescribed, or approved a given treatment. We are going to be the ones to make the decision about medical necessity, not them. Could it be any more blatant than that?

Mrs. BOXER. Will the Senator yield for a question on that, just to make sure I understand it? And I am so happy to hear my leader on the floor on this issue.

Mr. DASCHLE. I am happy too.

Mrs. BOXER. For example, a doctor examined a child and determined that child had a rare form of cancer. I had a constituent with this circumstance. It was a rare form of cancer, say, of the kidney, which happened to be the case, and she needed immediate surgery by a specialist who had done this operation before, because, by the very nature of it, it is a very dangerous operation, and the doctor said this is the only way this child could live.

Is my friend saying in that particular situation the bureaucrats and the businessmen in the HMO could essentially say: That is very interesting, but the child will have to go see the cancer doctor who is in our plan, and she may not go and see this specialist who actually could, in fact, save her life because he or she has done this operation before? Is that the essence of it?

Mr. DASCHLE. That is the essence of it. The Senator from California has put her finger on it precisely. What it is saying is, we as an insurance company or we as a HMO will override whatever decisions are made by doctors, by nurses, by nurse practitioners, by any kind of provider, if we find it is in our financial interest to do so.

Mrs. BOXER. What my friend is saying, further, is that in the Democratic Patients' Bill of Rights, we were going to offer an amendment as soon as we could on this—and that would be our first amendment—to ensure that the definition of what is medically nec-

essary is made by the physician and health care professionals, not by the business people with the green eyeshades who have no degree in medicine. Is that correct?

Mr. DASCHLE. The Senator is absolutely right. Let me just say, she asks exactly the right question because there is a followup requirement here which we will deal with in another amendment. What happens if there is a dispute? Right now, the insurance company holds all the cards.

The insurance company says: In the case of a dispute, we will make the decision about whether the patient is right or wrong. Our bill says: No, wait a minute; we are going to have a fresh review of the facts by an outside authority. They will make the decision as to whether the procedure was medically necessary or not. There has to be somebody outside the insurance company making that decision, or what good is it for us to guarantee these very important rights to all patients?

But I really appreciate the Senator from California making that point.

I yield to the Senator from Illinois.

Mr. DURBIN. I thank the minority leader for coming to the floor.

For those who have been following this debate for the 10 days or more now that we have tried to focus the attention of the Senate on this Patients' Bill of Rights, this is the health insurance issue which American families are focused on already. We have talked about a lot of things on Capitol Hill, but it is time to talk about the things that are important to them.

In the example the Senator from South Dakota and the Senator from California addressed, about a doctor being overruled, is it not also the case that in some of these same insurance policies the doctor cannot even tell the patient that he has been overruled by an insurance company, that, in fact, it is not his best medical judgment, but, in fact, the judgment of some bureaucrat in an insurance company that is going to dictate the treatment the patient receives?

Mr. DASCHLE. The Senator is absolutely right. In fact, in response to the good question posed by the Senator from Illinois, let me read the second statement of policy by another insurance company regarding this very question. Here is the statement of policy relating to medical necessity of a second insurance company.

Again, my colleagues, I am not making this up. We did not write this. This is written by the insurance company:

Medical necessity means the shortest, least expensive or least intense level of treatment, care or service rendered, or supply provided, as determined by us, to the extent required to diagnose or treat an injury or sickness.

This is actually out of the policy:

Medical necessity means the shortest, least expensive or least intense level of

treatment, care or service rendered, or supply provided, as determined by us. . . .

Do we need a Patients' Bill of Rights, when you take this right out of a health insurance manual: Medical necessity is determined by the shortest or least expensive way with which to provide service to a patient?

It doesn't end there:

The service or supply must be consistent with the insured person's medical condition at the time the service was rendered, and it is not provided primarily for the convenience of the injured person or doctor.

No wonder people go nuts when they talk about insurance policies today and what is going on out there, when they combat an insurance company that includes a provision like this. They may not have read all the fine print, but when a company says we are going to determine medical necessity by what is the shortest or least expensive—the Senator from Illinois is exactly right—this overrides everything.

Mr. DURBIN. I ask the Senator from South Dakota, the Democratic leader, to yield for this question. This is clearly an interesting and important debate on health insurance and protection for American families. What is stopping the Senate from engaging in this debate?

Mr. DASCHLE. I must say, some of our colleagues on the other side tell us they would rather not have to vote on this. They do not want to have to vote on amendments about medical necessity. That is what is stopping it right now. We are at an impasse because we believe this is such an important issue that votes and amendments on questions like medical necessity ought to be a part of any legitimate debate on a Patients' Bill of Rights. That is why we are not in agreement today. We feel those amendments are required if we are going to have a good debate. Our colleagues have at least today refused to allow them.

Mr. DORGAN. I wonder if the Senator from South Dakota will yield?

When he talks about medical necessity, I am reminded of two specific issues. One, the doctor who testified at a hearing before the Congress who worked for a managed care organization, who said: I caused the death of a man. She said it to a near-empty hearing room when the television cameras were gone. She was the last witness of a day.

I caused the death of a man, she said. I wasn't reproached for that. I wasn't issued any sanctions. In fact, my employer really felt quite good about it. I was rewarded for it. I withheld treatment that could have saved that person's life.

She was dealing at that point as an employee of an HMO, and a patient apparently needed some kind of heart procedure that was very expensive. The HMO said it was not a medical necessity. The patient died. This lady left

her employment and later testified before the Congress and said it was a matter of dollars and cents. I caused the death of a man, but I was lauded for that by my employer because, to them, it was a matter of dollars and cents. So that relates to medical necessity. What is necessary?

The second item I was thinking about, I know the Senator from South Dakota was at an event one day; the Senator from California, Mrs. BOXER, was at the same event. Dr. GANSKE, a Member of the House of Representatives, who is a Republican and has been a strong supporter of the Patients' Bill of Rights, held up a poster, a colored picture of a young boy. That young boy had no upper lip and no structure beneath his nose—a giant gaping hole. He was born with a very severe birth defect. It looked awful. One was hardly able to look at that young boy's face and not immediately say what incredible disfigurement this young boy has.

Dr. GANSKE, who was speaking that day, said: The HMO said there was not a medical necessity for this young boy to receive repairs. In dollars and cents, the repair of that horrible disfigurement did not make any sense to the HMO. But then he showed a picture of this young boy having gone through reconstructive surgery, and you saw a face, a wonderful face of a young boy which had been repaired and now that young boy had hope. One could sense the smile in that picture, and that is what medical necessity is.

It is not convenience. It is not just dollars and cents. It is investments in human beings, giving hope to a young boy.

I have one other person, if I may, whom I want to mention and whom I have mentioned before. He is a young boy born with horrible problems. The doctors said he would have a 50-percent chance of walking by age 5 if he had a certain kind of therapy.

The HMO said: A 50-percent chance of walking by age 5 is "insignificant," which means that in dollars and cents they withhold the therapy and the young boy is not able to walk. He doesn't have the chance to learn to walk.

That is dollars and cents versus medical necessity. That is what is at issue. What is at issue is the ability to empower patients with the opportunity to get needed medical treatment, not necessarily the cheapest treatment, but the best treatment, not necessarily the treatment that someone in an insurance office a thousand miles away thinks might or might not be necessary, but what the doctor in the doctor's office thinks is necessary for that young boy's life, such as the reconstructive surgery of that boy's face.

That is what I think about when the Senator speaks about medical necessity. This is not theory. It is not some abstract term. It is an important part

of lives, and that is why the Patients' Bill of Rights is so critically important and why the difference between what we are talking about and others are talking about is so stark.

We adopt the title, Patients' Bill of Rights, and then they say: We have one, too. Sure you have one. It is like picking up a turtle shell without a turtle in it. It is a shell. It does not mean anything. It does not provide the guarantees for people. That young boy would not have had his reconstructive surgery. The other young boy would not have had a chance to walk. And the list goes on. That is why these differences are so important.

Medical necessity, guaranteed emergency room treatment, the gag rule, understanding all your medical options for treatment, not just the cheapest—all of these things are critical differences, and it is why I believe they do not want to allow the Senator from South Dakota to bring the bill before the Senate. We need to vote on these things, if not in total, then one by one, to find out where do my colleagues stand on it. Do they stand for the right of emergency room treatment? Do they stand for the right of reconstructive surgery for that young boy? Where do they stand on these specific issues?

That is what is going to happen in the coming days. Like it or not, we are going to force them to face that, because the American people deserve the opportunity to have a Patients' Bill of Rights passed by this Congress empowering them.

Mrs. BOXER. Will the Senator yield for 30 seconds before he responds?

Mr. DASCHLE. I yield to the Senator from California.

Mrs. BOXER. In 30 seconds, I want to put a bigger picture on it. I had the pleasure of being at a press conference with the Senator from Maryland, Ms. MIKULSKI, and she made a point. She said this century has been the greatest century known to humankind for finding new options for care, new research, gene research. We know more now than we ever knew before, and how ironic it is that at a point in time, going into the next century, when we know more than any other nation in the world, in this country HMOs are denying our people access so they cannot benefit from this research.

As the Senator from South Dakota talks about medical necessity, if he can weave that into his comments, I will be very interested in his response.

Mr. DASCHLE. The Senator from California makes a very important point. It is our research and the extraordinary benefits that have come from it that have made a difference in people's lives all over the world. How ironic, after the American people spend valued tax dollars in support of research which is changing the quality of life for millions of people, that there

are insurance companies denying patients the opportunity to benefit from research today.

What happens? The benefits of that research goes abroad. It goes to Europe. It goes to Asia. It goes to Latin America. Thank goodness it does. But why should it go there and not be allowed here?

We use the term "clinical trials." It is a technical term. I like to get away from it, because I am not sure people understand what clinical trials are. Basically, when we talk about clinical trials, we talk about the right to ensure we benefit from innovative research. We should encourage experimental treatments when they are in the interest of the patient, and the doctor recommends them. That should be part of a Patients' Bill of Rights. But there is a chasm between Republicans and Democrats on that issue. Our Republican colleagues said: No, oh, no, that ought to be a decision the insurance company makes, not the doctor, not the patient.

I hope we keep talking about research and who benefits and how preposterous it is that in this country, even though we have these fundamental and extraordinary new possibilities to improved lives, there are insurance companies at this very moment that have just denied somebody access to that research.

The Senator from North Dakota is always so eloquent and so compelling in his comments. Again this morning he demonstrated why he enjoys the extraordinary respect of Senators on both sides of the aisle. One cannot talk in human terms, in personal terms very long, as he did, and not understand the importance of this issue. You can talk legalisms all you want. But if you put it in human life terms, as the Senator from North Dakota did—he put it in terms of life and death; he put it in terms of helping a young child—all of a sudden the light comes on and you understand why, when an insurance company actually has the audacity to write, "Medical necessity means shortest, least expensive, or least intense level of treatment," why that young boy did not get his facial problems fixed. It certainly did not fit "shortest, least expensive, or least intense level."

That case probably is expensive. It is not a short recovery. It is intense. It is the absolute reverse of the definition this particular company uses for medical necessity. Of course, it was medically necessary if that young boy's life meant anything. Of course, it was required if our society is going to be responsive at all. But for any company to say, we don't care what the doctor says, we don't care how inappropriate it may be to override a decision made by a doctor and his or her patient, we are going to decide the medical necessity of a treatment based on how short

it is, how inexpensive it is or how much it lacks intensity, that says in spades why this debate is important. It says why we will not give up our rights to offer amendments to ensure that issues like this are properly addressed. We will not walk away from this debate.

We must have an opportunity to have a good debate with good amendments on issues as important as this, and we can do it. There is a way to work through this procedure. This can be a win-win situation. I want to find a way with which to ensure we can get a lot done in the next 10 days, and yet accomplish what we believe so strongly must be a part of the Senate's agenda in this session of Congress. I yield the floor.

Mr. DORGAN. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. SPECTER. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

#### INVESTIGATING WAR CRIMES

Mr. SPECTER. Mr. President, I have sought recognition to compliment the prompt action of the Federal Bureau of Investigation in sending a forensic team to gather evidence in Kosovo for the prosecution of those indicted under the War Crimes Tribunal in the former Yugoslavia, which would include President Milosevic.

Earlier this morning, FBI Director Louis Freeh announced that some 59 agents of the Federal Bureau of Investigation, working with the Armed Forces Institute of Pathology, have been dispatched to Macedonia—will be in Kosovo—and will be, starting tomorrow, preserving evidence for the prosecution of those under indictment by the War Crimes Tribunal.

This is a very important step because we have already had a series of reports about tampering with evidence, about the removal of massive grave sites. The prompt action by the Federal Bureau of Investigation, moving to the scene of the crimes to gather evidence for use in court, is of the utmost importance.

For some 12 years, as an assistant district attorney and later as district attorney in Philadelphia, I had experience in the gathering of evidence for use in the criminal prosecution process. I can personally attest to the importance of prompt action.

If you do not get the evidence while it is fresh, it may disappear; its quality may change unless it is preserved. So the very prompt action of the FBI in moving on this is very important. It is especially important as the evidence is unfolding of the crimes against humanity by the Serbian Armed Forces under the direction of President Milosevic.

President Milosevic has already been indicted. The acquisition of this evidence will be key in preparing for the trial of the case. The long arm of the law extends very far. It is my prediction that one day President Milosevic will be in the dock at the Hague in the criminal court there, as will be Radovan Karadzic, the former head of Bosnia, General Mladic, and the others who are under indictment.

As I have noted before on the floor of the Senate, I believe that a condition of the cease-fire should have been having Milosevic turned over to the NATO forces. We learned from the bitter experience in Iraq—20/20 hindsight—we would have been wiser to have taken the steps necessary to take Saddam Hussein into custody. Our failure to do so has caused enormous problems. We have seen with Milosevic that he has started some three wars, and if he is at liberty, who knows what he may do in the future. That action has already been taken.

It is vitally important that the evidence be preserved so that when—and I do not say if—but when Milosevic and the other indictees are taken into custody, we will be in a position to have the prosecutors at the War Crimes Tribunal present that evidence.

I have had the honor to visit the War Crimes Tribunal in the Hague on a number of occasions. The prosecutors there are a very fine team. They have received support from a variety of Federal agencies. The CIA has been helpful with the overhead satellites. The Department of State has been of continuing assistance. The Department of Defense has been of assistance. Now the action by the FBI, with the approval of the Attorney General, is very important.

This is unprecedented for the FBI to undertake this kind of acquisition of evidence. There are precedents in the field where the FBI has worked overseas on the Khobar Tower bombing in Saudi Arabia and with the U.S. embassies in Kenya and Tanzania. The FBI was deployed to El Salvador for the investigations of murders that occurred in 1983. The FBI was involved in the investigation of war crimes in the former Yugoslavia in 1993, and involved in a polygraph examination in a murder case in Guatemala in 1995, and supported the investigation of a murder in Haiti in 1995.

The authority for the FBI to act on these premises is set forth in the Federal statute in 28 United States Code, section 533. The regulations which have been promulgated under that statute make a specific reference as follows:

As provided for in procedures agreed upon between the Secretary of State and the Attorney General, the services of the Federal Bureau of Investigation laboratory may also be made available to foreign law enforcement agencies and courts.

The War Crimes Tribunal would fit within that qualification as an international court.